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6 WMC Mortgage Corp. and
Deutsche Bank National Trust Company
7

8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
10

11 LEONARDO B. CRUZ, JR.,)	CASE NO. 08CV1157 BEN NLS
)	
12 Plaintiff Pro Se)	WMC MORTGAGE CORP.'S AND
)	DEUTSCHE BANK NATIONAL TRUST
13 vs.)	COMPANY'S NOTICE OF AND
)	MOTION TO DISMISS
14 WMC MORTGAGE CORP., LITTON)	
15 LOAN SERVICING, TD SERVICE)	[F.R.C.P. 12(b)(6)]
COMPANY AND DEUTSCHE BANK)	
16 NATIONAL TRUST COMPANY,)	DATE: SEPTEMBER 8, 2008
)	TIME: 10:30AM
17 Defendants.)	PLACE: COURTROOM 3
)	

18
19 TO EACH PARTY AND ATTORNEY OF RECORD:

20 PLEASE BE ADVISED AND TAKE NOTICE THAT on September 8, 2008, at
21 10:30AM, or as soon thereafter as counsel may be heard, in Courtroom 3 of the above
22 entitled court located at 880 Front Street, San Diego, California, the Honorable Roger T.
23 Benitez, United States District Judge presiding, Defendants WMC Mortgage Corp. and
24 Deutsche Bank National Trust Company will, and do hereby, move to dismiss the
25 Complaint filed by Leonardo B. Cruz, Jr. (the "Motion to Dismiss"). The Motion to Dismiss
26 is made by authority of Rule 12 of the Federal Rules of Civil Procedure, and the applicable
27 Local Rules of this Court.

28 ///

1 The Motion to Dismiss is made on the grounds that the first and only cause of action
2 of the Complaint for the alleged violation of the Truth In Lending Act [15 U.S.C. §1601, *et*
3 *seq.* ("TILA")] fails to state a claim upon which relief can be granted [F.R.C.P. 12(b)(6)] as
4 Plaintiff's claims are barred by 15 U.S.C. §1640(e) and §1635(f). The Motion to Dismiss will
5 be based upon this notice, the Memorandum of Points and Authorities contemporaneously
6 filed herewith and upon such other evidence and argument as may be received by this
7 Honorable Court at the hearing.

8 DATED: July 31, 2008

Mark V. Asdourian, Esq.
Attorney & Counsellor At Law,
A Professional Corporation



By: _____
Mark V. Asdourian, Esq.
Attorneys for Defendants,
WMC Mortgage Corp. and
Deutsche Bank National Trust Company

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the City of Newport Beach, County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is: Mark V. Asdourian, Attorney & Counselor At Law, A Professional Corporation, 4695 MacArthur Court, Suite 1000, Newport Beach, California, 92660.

On July 31, 2008, I served a copy of the document(s) named below on the parties interested in this action.

DOCUMENT(S) SERVED: **WMC MORTGAGE CORP.'S AND DEUTSCHE BANK
NATIONAL TRUST COMPANY'S NOTICE OF AND
MOTION TO DISMISS**

☒ By placing ☐ the original ☒ a true and correct copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U. S. Postal Service on that same day with First Class postage, thereon fully prepaid at Newport Beach, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE:** I arranged to have DDS Legal Support Systems deliver said document by hand to the person(s) stated at the address listed above. An additional Proof of Service will be signed by the courier and filed at a later date.

☐ **BY FACSIMILE:** I transmitted a true and correct copy of the above-referenced document from a facsimile machine at Mark V. Asdourian, Attorney & Counselor At Law, A Professional Corporation whose facsimile number is (949) 221-0019 to the interested parties in this action at the facsimile number listed above. The above-described transmission(s) was/were reported as complete, without error, by a **COMMUNICATION JOURNAL** issued by the facsimile machine.

☐ **STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ **FEDERAL:** I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this court, at whose direction this service was made.

Executed on **July 31, 2008**, at Newport Beach, California.



 Mark V. Asdourian

SERVICE LIST

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. STATEMENT OF THE CASE.

3 On the eve of foreclosure and several months after having filed bankruptcy, on June
4 30, 2008, Plaintiff filed the instant complaint (the "Complaint") accompanied by an ex parte
5 application seeking to enjoin the foreclosure of that certain real property located at 2541
6 Calle Tres Lomas, San Diego, California (the "Property"). Both the Complaint's prayer for
7 damages and Plaintiff's request for a provisional remedy are based upon the defendants'
8 alleged violations of the Truth In Lending Act [15 U.S.C. §1601, *et. seq.* ("TILA")] in
9 connection with a refinance of the Property.

10 Specifically, the verified Complaint alleges that on August 29, 2006, Plaintiff entered
11 into a consumer credit transaction with WMC subject to TILA. Complaint, ¶¶ 11 and 16.
12 The pleading then goes on to detail numerous violations of TILA including, *inter alia*, the
13 failure to provide the notice of a right to rescind as well as the failure to disclose the finance
14 charges or fees paid to brokers. Complaint, ¶¶ 19, 20 and 21. By reason of these alleged
15 violations, Plaintiffs seeks to rescind the transaction and recover damages.

16 Contemporaneous with the filing of the Complaint, Plaintiff filed a "Motion for Ex
17 Parte Temporary Restraining Order" seeking to enjoin the foreclosure of the Property
18 which is alleged to have taken place on June 12, 2008 (the "Ex Parte Application"). No
19 notice of or hearing date was scheduled for the Ex Parte Application. Given the fact that
20 the Complaint and request for a provisional remedy were filed weeks after the date of the
21 foreclosure, by order dated July 1, 2008, this Honorable Court denied as moot the Ex Parte
22 Application. As will be seen, Plaintiff's Complaint fails to state a claim upon which relief
23 may be granted as a matter of law. Accordingly, Defendants respectfully submit that the
24 instant motion should be granted and the action dismissed with prejudice.

25 ///

1 **II. A MOTION TO DISMISS MAY CHALLENGE A COMPLAINT BARRED**
2 **BY THE STATUTE OF LIMITATIONS.**

3 It is well established that when the running of a statute of limitations is apparent
4 from the face of the complaint, the defense may be raised by a motion to dismiss under
5 Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Conerly v. Westinghouse Elec. Corp.*,
6 632 F.2d 117, 119 (9th Cir. 1980). Here, the verified Complaint together with the verified Ex
7 Parte Application contain judicial admissions which indisputably establish that Plaintiff's
8 claims are barred by the statute of limitations.

9 **III. THE COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS.**

10 **A. The Request for Rescission Is Untimely.**

11 Plaintiff's ability to rescind the refinance of the Property almost two years ago under
12 TILA is governed by 15 U.S.C. §1635 which provides as follows:

13 “(a) [I]n the case of any consumer credit transaction . . . in which a security
14 interest, including any such interest arising by operation of law, is or will be
15 retained or acquired in any property which is used as the principal dwelling of the
16 person to whom credit is extended, the obligor shall have the right to rescind the
17 transaction until midnight of the third business day following the consummation
18 of the transaction or the delivery of the information and rescissions forms required
19 under this section together with a statement containing the material disclosures
20 required under this subchapter, whichever is later . . .”

21 Plaintiff's rescission rights under §1635(a)¹ are nonetheless limited by the time
22 restrictions set forth in §1635(f) which states as follows:

23 “An obligor's right of rescission shall expire three years after the date of
24 consummation of the transaction or upon the sale of the property, *whichever occurs*
25 *first*, notwithstanding the fact that the information and forms required under this
26 section or any other disclosures required under this part have not been delivered to
27 the obligor . . .” Emphasis added.

28 The verified Complaint alleges that Plaintiff entered into the loan transaction on
29 August 29, 2006. The verified Ex Parte Application admits that the foreclosure sale for the
30 Property was scheduled for June 12, 2008. Under these facts and by authority of §1635(f),

31 ¹ Unless indicated otherwise, all statutory citations refer to Title 15 of the
32 United States Code.

1 Plaintiff's right of rescission expired on June 12, 2008, the date Plaintiff admits the Property
 2 was sold. The Complaint, filed over two weeks later on June 30, 2008, is therefore untimely
 3 as a matter of law.

4 **B. The Cause of Action Seeking Damages for Violation of TILA Is Untimely.**

5 While Plaintiff is entitled to recover damages under §1640(a) in the event of a TILA
 6 violation, this right is similarly limited by time restrictions. Specifically, §1640(e) defines
 7 the time frame within which a claim for damages for TILA violations must be brought. The
 8 statute provides, in relevant part, as follows:

9 " Any action under this section may be brought in any United States district
 10 court, or in any other court of competent jurisdiction, within one year from the date
 of the occurrence of the violation . . ."

11 In determining when an "occurrence" has transpired thereby triggering the one
 12 year statute of limitations mandated by §1640(e), the courts have determined that a credit
 13 transaction requiring disclosures under TILA is concluded when the lender and borrower
 14 enter into a contract for the extension of credit. Accordingly, the disclosures in connection
 15 with such a transaction must be made a some point before the transaction is consummated.
 16 If the disclosures are not made, the TILA violation occurs, at the latest, when the parties
 17 perform the contract. The one year statute of limitation therefore commences upon the
 18 execution of the contract. *Wachtel v. West*, 476 F.2d 1062 (6th Cir. 1973). See, also, *Meyer v.*
 19 *Ameriquet Mortgage Co.*, 342 F.3d 899 (9th Cir. 2003).

20 In his verified Ex Parte Application, Plaintiff admits that he entered into the
 21 consumer credit transaction with WMC on August 29, 2006. This is two months short of
 22 two years before the Complaint was filed. By reason of this admission, the last date on
 23 which Plaintiff could have filed a complaint for damages for violation of TILA was August
 24 28, 2007. The Complaint, filed June 30, 2008 is indisputably untimely as a matter of law.

25 ///

1 IV. CONCLUSION.

2 For all of the foregoing reasons, the motion to dismiss should be granted. In light
3 of the admissions made by Plaintiff in the verified Complaint and the Ex Parte Application,
4 Defendants respectfully submit that no amendment can cure this defect. The Complaint
5 should therefore be dismissed with prejudice.

6 DATED: July 31, 2008

Respectfully submitted,

7 Mark V. Asdourian, Esq.
8 Attorney & Counsellor At Law,
A Professional Corporation

9
10 

11
12 By: _____
13 Mark V. Asdourian, Esq.
14 Attorneys for Defendants,
15 WMC Mortgage Corp. and
16 Deutsche Bank National Trust Company
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On July 31, 2008, I served a copy of the document(s) named below on the parties interested in this action.

DOCUMENT(S) SERVED: **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WMC MORTGAGE CORP.'S AND DEUTSCHE BANK NATIONAL TRUST COMPANY'S MOTION TO DISMISS**

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Executed on **July 31, 2008**, at Newport Beach, California.



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